(4)

No. 01-426

IN THE

Supreme Court of the United States

KEMPER INSURANCE COMPANIES,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's Rule 29.6 Statement was set forth at page ii of Petitioner's Opening Brief, and there are no amendments to that Statement.

ARGUMENT

I. This Court's Decision In *Wolens* Does Not Allow Air Carriers To Ignore Public Policy Considerations Mandated By Federal Common Law Which Forbid Common Carriers To Exempt Themselves From Liability For Their Negligent Acts.

Respondent contends that public policy considerations under federal common law which forbid common carriers from exempting themselves from liability for their negligent acts are preempted under the Airline Deregulation Act ("ADA"), § 41713(b)(1), pursuant to this Court's decisions in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 219 (1992), and that now market forces are the only governing standard. As a preliminary matter, the ADA, and thus the holdings in *Wolens* and *Morales* do not apply to motor carriers or shipments transported exclusively by truck — as four of eight shipments at issue were here. But more importantly, both *Wolens* and *Morales* addressed whether and when *state* law is preempted by § 41713(b)(1). The issue in *Wolens* was whether a state deceptive trade practices act was preempted by § 41713(b)(1), and the issue in *Morales* was whether state guidelines governing airline fare advertising were preempted. There is nothing in either decision to suggest that established federal common law concerning common carriers' limitation of liability is somehow preempted by § 41713(b)(1). Section 41713(b)(1) reads as follows:

> Preemption - Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least two States may not enact or enforce a law, regulation, or other

> provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Respondent concedes that federal common law, namely the released value doctrine, applies to determine the enforceability of its limitation of liability for valuables. Yet at the same time, respondent argues that the public policy considerations which the released value doctrine were founded on, namely that carriers cannot exempt themselves from liability for their negligent acts, is now excess baggage which need not be considered by this Court. Respondent cannot have it both ways. Respondent cannot separate the requirement that carriers cannot exempt themselves from liability for their negligence from the released value doctrine as a whole. As this Court and lower federal courts have held numerous times, a carrier's limitation is unenforceable if it exempts the carrier from liability for its negligence. Please see *New York, N.H. & Hartford R. Co. v Nothnagle*, 346 U.S. 128, 136 (1953); *Union Pacific R. Co. v Burke*, 255 U.S. 317, 321-22 (1921); *Boston & M.R.R. v. Piper*, 246 U.S. 439, 444 (1918); *George N. Pierce Company v. Wells Fargo & Company*, 236 U.S. 278, 283 (1915); *Boston & Maine Railroad v. Katherine Hooker*, 233 U.S. 97, 120-21 (1914); *Missouri Kansas & Texas Railway Company v. Harriman Brothers*, 227 U.S. 657, 672 (1913); *Kansas City Southern Railway Company v. J.M. Carl*, 227 U.S. 639, 649-50 (1913); *Adams Express Company v. E.H. Croninger*, 226 U.S. 491, 509 (1913); *Hart v. Pennsylvania R. Co.*, 112 U.S. 331, 338 (1884). Nothing in the ADA, *Wolens* or *Morales* suggests that either air or motor carriers can now disregard this Court's prior rulings by exempting themselves from liability for their negligence.

49 U.S.C. § 14706, "the Carmack Amendment" recognizes and codifies the carrier's right to limit its liability by contract. However, Congress has specifically retained the requirement that to be enforceable, any such limitation must be "reasonable in the circumstances surrounding the transportation". Thus, carriers' limitations of liability are not merely and exclusively contractual, but are still subject to objective external standards and review. Though the Carmack Amendment itself is only applicable to motor carriers, the common law which it codifies is equally applicable to air carriers. *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1314 (9th Cir. 1977)

Respondent quotes *Hart* as establishing that a carrier may legally limit its liability by contract. Petitioner does not dispute that a carrier can limit its liability, *as long as it does not exempt itself from liability by offering no terms by which it can be held liable over a certain amount. Hart* expressly found:

> It is the law of this court that a common carrier may, by special contract, limit his common law liability; *but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants.*

Id. at 338.

Respondent limits the value shippers of valuables can declare to $500 but accepts valuables of any value. Respondent not only accepts valuables of any value but solicits shippers of high value items. If the shipper declares a value greater than $500 on the air waybill, respondent accepts the shipment and even charges a higher freight charge,

but if the valuable is lost or damaged, the respondent will pay only $500 regardless of the freight charge paid by the shipper. There is no relation between the freight charge and the liability assumed by respondent. Respondent's limitation is unenforceable because it exempts respondent from liability over $500 just as in *Burke*, where the carrier's limitation was held unenforceable because the carrier exempted itself from liability over $100 by limiting the value a shipper could declare to $100 per package. *Burke* at 321-22.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in petitioner's opening brief, this writ should be granted.

Respectfully submitted,

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